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In the

Supreme Court of the United States

OCTOBER TERM, 1965.

ROY J. SMITH, Successor Trustee, et al.,
JOSEPH J. DROBNICK, MARK J. DROBNICK,
Petitioners,

vs.

THE DEPARTMENT OF PUBLIC WORKS AND BUILDINGS OF THE STATE OF ILLINOIS, ETC.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, SECOND DISTRICT AND TO THE SUPREME COURT OF ILLINOIS.

JOSEPH J. DROBNICK, *pro se.*
MARK J. DROBNICK, *pro se.*
415 Madison Street
Waukegan, Illinois

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Petitioners, Joseph J. Drobnick and Mark Drobnick, respectfully pray that a writ of certiorari issue to review the judgment of the Illinois Appellate Court, Second District and the order of the Supreme Court of Illinois denying the petitioners' petition for leave to appeal.

OPINIONS BELOW.

The opinion of the Illinois Appellate Court, Second District is reported in abstract in 61 Ill. App. 2d 301 and is appended to the Appendix A in full in this petition. A timely petition was filed with the Illinois Supreme Court requesting leave to appeal, but such petition was denied without opinion (see Appendix B).

JURISDICTION.

The judgment of the Illinois Appellate Court, Second District was entered on the 28th day of July, 1965; and the Petition for Rehearing, which was filed in due time, was denied August 26th, 1965. A timely petition for leave to appeal was filed with the Illinois Supreme Court and was denied on November 17th, 1965. The jurisdiction of this Court is invoked under 28 U.S.C.A. ¶ 1257(3). The jurisdiction of this Court is further invoked under 28 U.S.C.A. 1358. Further, the matter in controversy exceeds the sum or value of $10,000 exclusive of interest and costs (28 U.S.C.A. 1331).

As expert valuation witnesses for land owner testified value of land taken is $27,500.00 (Abst. 115-121).

QUESTION PRESENTED.

Can a State take private property from an individual citizen without proving the value of the property taken and yet comply with the due process clause of the 14th Amendment of the United States Constitution?

CONSTITUTIONAL PROVISION.

The only constitutional provisions, treaties, statutes, ordinances or regulations involved is the Fourteenth Amendment to Federal Constitution.

STATEMENT.

Part of the funds and money used to pay this condemnation judgment in this case comes from the Federal Government as Belvidere Road is a Federal Aid Route (No. 21) and Federal Aid Project (No. 21).

The Department of Public Works and Buildings of the State of Illinois filed a petition to condemn land on April 23rd and on June 18th, 1959 and for the taking of 5 parcels

of land designated herein as parcels 31, 33, 34, 35 and 36. The State also filed a Quick Take Motion and the Quick Take Compensation based on the State's own hired appraiser, back in 1959, testified on the dollar amount of valuations on these 5 parcels of land to-wit:

Parcel	Amount
31	$ 185.00
33	$ 543.98
34	$ 831.19
35	$ 499.99
36	$3,984.47
Total:	$6,044.71

The State admitted that the amount of land being taken amounted to about 22,720 square feet adjoining Belvidere Road. The proved zoning of parcels 31, 33, and 34 was residential. The proved zoning of parcels 35 and 36 was commercial. The land is all located in the City of Waukegan.

At a hearing to determine preliminary just compensation the Court entered an order finding just compensation in accordance with the uncontested evidence of the State, to-wit: in the sum of $6,044.71. On June 3rd, 1963, a jury was sworn and empanelled to try the cause. The jury rendered a verdict of $175.00 for tract 31, of $280.00 for tract 33, of $550.00 for tract 34, of $110.00 for tract 35, of $885.00 for tract 36. Judgments on these verdicts were entered on the 11th day of June, 1963.

As to the 10-foot strip that is described in the Petition to Condemn, the land is subject to a building line easement. And as to the value of the 10-foot strip, both of the expert valuation witnesses for the State said:

> "That the fair cash market value of the strip is subject to the rights created by the easement and therefore it is a thing *not saleable in the market* . . . and therefore the fair cash market value of the land being taken is $400.00" (Abst 103, 113).

The verdicts of the jury and the judgments entered thereon do not award the defendants the just compensation which the law requires.

REASONS FOR GRANTING THE WRIT.

The State has taken the petitioners' property in violation of the due process clause of the 14th Amendment of the United States Constitution because here the State has failed to introduce competent evidence on the value of the property taken and has failed to sustain their burden of proof and establish a *prima facie* case. The judgment for condemnation cannot stand-up in a Court of law where the State fails to establish a *prima facie* case.

The State applied the market value rule to the property being taken after all of the expert witnesses for the State said the property was a *thing not saleable* in the market. By doing this, the expert witnesses for the State disqualified themselves and their testimony should have been stricken on motion of the land owner. If it is true that the land being taken is not saleable in the open market because it is restricted by a building line and landscape easement, then "value to the owner" is the test that should have been applied to the property. *Kimball Laundry Co.* v. *U.S.*, 338 U.S. 1, 5, 69 Sp. St. Reporter 1438. Our Supreme Court in the *Kimball Laundry Co.* case said:

> "But where property is of the kind that it is seldom exchanged, it has no market price, and then recourse must be had to other means of ascertaining value,

> including value to the owner as an indication of value to other potential owners enjoying the same rights."

So here it was the duty of the expert valuation witnesses for the State to use "value to the owner" as the test of value once they announced in open Court that the property taken had no value in the market and it was a thing not saleable in the open market.

Chicago E. and L. R.R. Co. v. *Catholic Bishop of Chicago,* 119 Ill. 525 at 529.

Chicago R.R. Co. v. *Chicago,* 149 Ill. 457 at 461.

C. B. and Q. R.R. v. *Naperville,* 166 Ill. 87 at 92.

CONCLUSION.

For the foregoing reasons it is respectfully requested that this petition for a writ of certiorari be granted.

Respectfully submitted,

JOSEPH J. DROBNICK, *pro se*
MARK DROBNICK, *pro se*

MARK DROBNICK
415 Madison Street
Waukegan, Illinois.

APPENDIX "A"

OPINION OF THE APPELLATE COURT.

ABRAHAMSON, *P.J.*

This proceeding was originally filed in the County Court of Lake County, which court is now a part of the circuit Court of Lake County. The proceeding was brought to acquire 5 parcels of land for highway purposes. Defendants filed a motion to traverse and dismiss. After lengthy hearings, the trial court denied the traverse and entered orders permitting a "quick take" by the Petitioner. Subsequently, a jury trial was held on the issue of compensation and the total verdict was in the amount of $2,000.00.

Defendants appealed and stated their theory of the case as follows:

> "The respondent-appellants' theory of the case is that the Petitioner attacked the title and ownership of the Respondents' land being taken in the presence of the condemnation jury; the petitioner claimed title and ownership to a 80 foot highway prior to the filing of the petition to condemn; the petitioner claimed title to Belvidere Road under the doctrine of adverse user before and to a condemnation jury; the petitioner improperly described the area needed for road purposes in its petition to condemn; the petitioner improperly applied the market value rule to property which the petitioner characterized as having a special or particular use; and the Trial Court improperly struck the Cross-Petition; and the Attorney for the Condemnor presented prejudicial motions and prejudicial and improper arguments to the jury so that the verdicts rendered and the judgments entered thereon do not award to the Respondents the just compensation which the law requires."

Belvidere Road is an existing State Highway which runs Westerly from Waukegan in Lake County, Illinois. On or about May 1, 1958, Petitioner instituted condemnation proceedings in which Petitioner claimed a 30 foot easement and right of way for highway purposes on either side of the center line of Belvidere Road and sought to acquire an additional 10 feet on either side of Belvidere Road, increasing the overall right of way from 60 to 80 feet with the intention of replacing the two lane highway then existing along Belvidere Road with a four lane highway. The defendants are the owners of three parcels of land lying to the South of Belvidere Road and two parcels lying to the North.

At the hearing on the traverse, defendants contended that they owned fee simple, absolute title, to the center line of existing Belvidere Road, that the legal description of the taking should run to the center line without exception, and that compensation should be adjudicated accordingly. The trial court overruled the traverse, holding that petitioner had a right of way by prescription to sixty feet, (30 feet each side of the center line). Thereupon, a quick take order was entered adjulicating preliminary just compensation, the funds were deposited, an order vesting title was entered, and the defendants thereafter withdrew the deposit of $6,044.71.

Later, the defendants filed a cross-petition which then admitted that the petitioner had a right of way over sixteen feet on each side of the center line, and averred that defendants owned the next fourteen feet on each side of the center line and that petitioner sought to condemn and pay for only the outer ten feet on each side of the center line. Defendants prayed for damages to the fourteen foot strips on each side of the road adjacent to and beyond each parcel of the admitted sixteen foot right of way on

each side of the centerline of Belvidere Road. They also sought compensation for the taking of the ten foot parcels on each side of the road and damage to the remainder generally.

No draft order had been entered formalizing the Court's ruling as to the existing right of way at the conclusion of the traverse hearing. Because of the absence of a formal court order spelling out the Court's finding that the petitioner had an easement by prescription over sixty feet (30 feet each side of the center line), and upon the insistence of the defendants that this issue be relitigated and complete proofs required, the court ruled that it would "reconsider the question of whether an easement was or was not established and require proofs to be submitted in the present trial on the question as to whether or not there was a thirty foot easement (on each side of the center line) established by the State." Petitioner suggested that evidence on that issue be taken outside the presence of the jury, but defendants did not join in this request. Adequate testimony was presented before the jury to establish that the Condemnor had an easement by prescription over sixty feet. The trial court then struck the cross-petition as to the fourteen feet on the basis of the evidence and precluded any defense testimony as to the damage thereto.

Defendants, for their first two contentions, argue that the court erred in permitting petitioner to introduce evidence attacking defendants' title to the various strips of land involved. Defendants correctly state that the law is that in condemnation cases the jury is impanalled merely to ascertain and determine the just compensation to be awarded to the owners of the property being taken or damaged and that no issue of ownership or title can be presented to the jury. The question of title, if any, is

preliminary to the submission of the question of damages to the jury and must be determined before the jury is impanelled. *Metropolitan El. Ry. Co.* v. *Eschner,* 232 Ill. 210; *Chic. and Mil. Elec. Ry. Co.* v. *Diver,* 213 Ill. 26.

The defendants contend that the Court erred in striking the counter-petition as to their ownership of the fourteen foot strips described in said petition and complain that evidence on this issue was presented to the jury. It is clear from the record in this case that before submitting the case to the jury the Court struck the counter-petition as to the fourteen feet and no evidence of title was submitted to the jury. That plaintiffs had a pre-existing right of way over these fourteen foot strips was properly determined by the Court. *City of Highland Park* v. *Driscoll,* 24 Ill. 2d 281.

Petitioner never questioned that defendants owned fee simple, absolute title to the center line of Belvidere Road as it existed as to date of the filing of these proceedings, but claimed an easement for highway purposes. The question of the easement was not submitted to the jury for determination. The trial judge in dismissing the cross-petition as to the fourteen foot strips made this determination. Although the propriety of this procedure may be questioned, the failure of the defendants to join in the petitioners' request that the matter be heard outside the presence of the jury leads us to conclude that this was not prejudicial. However, if we view such procedure as prejudicial error, even then such error was induced by defendants and they cannot complain because of it. *City of Waukegan* v. *Stanczak,* 6 Ill. 2d 594, 608.

The court did not err in striking the cross-petition. Defendants contend that the taking of the additional ten foot strip beyond the fourteen foot strip described in the cross-petition is tantamount to the taking of the fourteen

foot strips. The court properly determined that the fourteen foot strips had been subject to an easement for highway purposes by prescription for years and the proofs so disclosed that the taking of the additional ten foot strips for highway purposes expanded the highway and in no way affected the interest of the defendants in the property described in the cross-petition. *City of Highland Park* v. *Driscoll, supra.*

Error is urged in the admission of a County zoning ordinance requiring that all subdivisions adjoining State roads shall provide for a minimum width of not less than one hundred feet, for highway purposes. The property adjoining had not been subdivided and was for the most part vacant and unimproved. Petitioners' proof indicated the highest and best use of the premises was for a residential subdivision. It appears that the ordinance relates to and is pertinent to this issue and was properly admitted. *City of Chicago* v. *Pridmore,* 12 Ill. 2d 447, 451.

Defendants argue that the landscape or planter easement placed the premises in a "special use" catagory and, therefore, the market value test should not apply. Defendants failed to offer any proof of value predicated on a "special use" theory nor does there appear any reason to conclude that merely because of the existence of the planter easement a special use is created. *Peo. Gas Light & Coke Co.* v. *Buckles,* 24 Ill. 2d 520, 531 and 532. Generally exceptions occur when property has special capabilities which make it unmarketable as its true value due to unique improvements, such as a church, a school or a railroad terminal. *Housing Authority* v. *Kosydor,* 17 Ill. 2d 602, 605 and 606.

Defendants also contend that counsel for the petitioner was guilty of improper and prejudicial conduct during the trial and that his arguments at the close were inflamma-

tory and prejudicial. Defendants contend it was prejudicial for petitioner's counsel, on cross examination, to ask one of the defendants how long he had been a land speculator. This was permissive in that defendant testified in direct examination in response to questions from his counsel as follows:

> "Q. In your business as a real estate broker, do you buy and sell land?
>
> A. Yes. We have been buying and selling land for our investors and for our own speculative account for well over twenty years, in fact, some of it almost forty years."

Defendants also object that petitioner's attorney charged one of the defendants and the attorney for the other defendants with being in contempt in connection with certain testimony that the defendant in question had given. The record indicates that on the occasion in question the defendant and his attorney persisted in seeking to introduce evidence to which the trial court had sustained objections and because of the persistence of the defendant and his attorney in this matter we deem it not prejudicial for petitioner's attorney to charge the attorney or the defendant with being in contempt.

Defendant also states that the petitioner attempted to show negotiations toward a settlement of this matter. The record fails to show any reference to negotiations and we find no prejudice to the defendant on this ground.

We have read the closing arguments of counsel for petitioner and do not find as contended by defendants, that petitioner's arguments were in any way inflammatory or prejudicial.

Finally, the record discloses that the jury verdict was well within the range of the testimony presented. The Illinois Courts on review have refused to disturb the verdict of the jury in condemnation cases, despite some irregularities in proceedings. Here the jury has viewed the premises and no prejudice or clear and palpable mistake is shown. *Dept. of Public Works* v. *Drobnick,* 14 Ill. 2d 28; *Dept. Public Works & Bldg.* v. *Bloomer,* 28 Ill. 2d 267.

For the reasons above stated the decision of the lower court is affirmed.

JUDGMENT AFFIRMED.

MORAN, *J.* and DAVIS, *J.* concur.

United States of America

State of Illinois
Supreme Court
} ss.

At a Term of the Supreme Court, *begun and held in Springfield, on Monday, the* eighth *day of* November *in the year of our Lord, one thousand nine hundred and* sixty-five *, within and for the State of Illinois.*

PRESENT: RAY I. KLINGBIEL, CHIEF JUSTICE

JUSTICE [redacted] JUSTICE WALTER V. SCHAEFER

JUSTICE HARRY B. HERSHEY JUSTICE BYRON O. HOUSE

JUSTICE ROY J. SOLFISBURG, JR. JUSTICE ROBERT C. UNDERWOOD

WILLIAM G. CLARK, ATTORNEY GENERAL

ROBERT G. MILEY, MARSHAL

ATTEST: MRS. EARLE BENJAMIN SEARCY, CLERK

Be It Remembered, *that, to-wit: on the* 17th *day of* November *19* 65 *, the same being one of the days of the term of Court aforesaid, the following proceedings were, by said court, had and entered of record, to-wit:*

The Department of Public Works and Buildings of the State of Illinois, etc.,

Respondent

No. 39544 vs.

Roy J. Smith, Successor Trustee, et al.,

Petitioners

Petition for Leave to Appeal from Appellate Court
Second District
15148
64 - 51

And now on this day the Court having duly considered the Petition for Leave to Appeal herein as well as the record and abstract, filed in support thereof, and being now fully advised of and concerning the premises, doth overrule the prayer of the petition and denies Leave to Appeal herein.

[redacted]

I, MRS. EARLE BENJAMIN SEARCY, *Clerk of the Supreme Court of the State of Illinois and keeper of the records, files and Seal thereof, do hereby certify that the foregoing is a true copy of the final order of the said Supreme Court in the above entitled cause of record in my office.*

In Witness Whereof, *I have hereunto subscribed my name and affixed the Seal of said court this* 23rd *day of* November *, 19* 65.

(SEAL)

/s/ Mrs. Earle Benjamin Searcy
Clerk,
Supreme Court of the State of Illinois.